Before the

FEDERAL TRADE COMMISSION

Washington, D.C.

CAN-SPAM ACT RULEMAKING, PROJECT NO. R411008

Comments of

JUMPSTART TECHNOLOGIES, LLC

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INTRODUCTION

As a leading online direct marketer, Jumpstart applauds the Commission's efforts in compiling thoughtful and comprehensive questions in its Notice of Proposed Rulemaking (the "NPRM"). Our firm knowledge of the principles and technology of online media required to deliver world class direct marketing and customer service gives us direct insight into the intricacies of the proposed Rules, and our expertise in engineering refer-a-friend programs places us in unique position to offer cogent advice regarding the Commission's guidance in this area.

We appreciate the Commission's consideration of our opinions set forth in this letter as well as those communicated pursuant to our ongoing engagement with the Commission.

OPT-OUT OBLIGATIONS FOR LIST PROVIDERS

We recognize that one of the fundamental provisions under the CAN-SPAM Act is for commercial email recipients to have the opportunity to request not to receive further email messages from the senders of the email and for such requests to be honored. We believe that imposing opt-out obligations on list providers who do nothing more than provide a list of names to whom others send commercial emails will frustrate that purpose and will further impose unnecessary administrative costs and complexity for legitimate list providers and email marketers.

First, as noted in the Commission's discussion of its proposed definition of the term "sender," under certain circumstances, email messages already are required to contain many different opt-out mechanisms and postal addresses. Each opt-out mechanism is required to be clear and conspicuous.

Currently, as a result of the consumer confusion created by the presence of multiple mechanisms and addresses, our customer service department routinely receives inquiries regarding the products and services being advertised within emails sent by us, inquiries which should properly be directed to the advertisers instead. Inclusion of another opt-out mechanism and postal address would only increase consumer confusion as to which person is responsible for each mechanism and/or postal address and would result in many consumers submitting opt-out requests to unintended persons, resulting in increased consumer dissatisfaction as consumers perceive that their requests not to receive further email messages are not being honored. Consumer distrust of commercial email will increase and negatively impact the industry.

Second, inclusion of another opt-out mechanism and postal address would necessarily increase the passing of suppression lists back and forth among various parties and thereby increase the risk that consumers' private information may be shared with inappropriate entities, subjected to greater vulnerability from hackers or that mistakes will be made. We also note that the additional suppression list passing and processing would potentially occur over an even shorter time period pursuant to the Commission's proposed reduction

of the time period for honoring opt-out requests to three business days, thereby heightening these risks.

Finally, we believe that the critical components and spirit of opt-out mechanisms are two-fold: (1) that they be clear and conspicuous to users, meaning simple and easy-to-use; and (2) that they always work as expected, meaning that the technical and operational back-end ensures that the links are constantly tested and monitored and function properly. These are not trivial tasks. Adding yet another unsubscribe mechanism makes the process more difficult to administer for advertisers and list publishers and more confusing to users by an order of magnitude.

SAFE HARBOR FOR ADVERTISERS

We believe the Commission is wise not to eliminate advertiser responsibility for email messages promoting the advertiser's product or service if sent by affiliates or third parties over which the advertiser has no control in all circumstances. The responsibilities advertisers currently have for such email messages properly encourage advertisers to give guidance to each third-party representative regarding acceptable headers for emails advertising the advertisers' products and services, to monitor the activities of each third-party representative and to take corrective action when such parties fail to comply with the law. Elimination of such responsibilities through safe harbors at only the advertiser-level would create a perverse incentive for advertisers to formally comply— by developing superficially compliant advertising creative and by providing little or no guidance to their affiliates as to acceptable headers— with the tacit intent that advertiser-affiliates will absorb what are currently shared risks and compliance responsibilities and engage in aggressive, non-compliant marketing practices to meet advertiser performance expectations. Similarly, advertisers would have no real incentive to ensure that their affiliates include the advertisers' opt-out mechanisms and postal addresses in compliance with the CAN-SPAM Act— and would actually benefit from the representatives' failure to do so. This is a particularly problematic outcome as advertisers are the parties most familiar with the products and services being advertised and the most appropriate advertising creatives for such products and services and are therefore best positioned to identify and check affiliate abuses of the CAN-SPAM Act at all stages of the online marketing process.

Currently, it is common industry practice for negotiated agreements between advertisers and third-party affiliates to contain contractual representations and warranties and indemnification provisions that clearly state each party's responsibility for complying with the CAN-SPAM Act and each party's liability for failures to do so. Such provisions provide advertisers with adequate guidance of their potential liability and allow advertisers to make informed decisions as to the appropriate level of guidance and monitoring of their third-party representatives.

VALID PHYSICAL POSTAL ADDRESS

We believe the Commission's proposed definition of "valid physical postal address" clarifies what will suffice under the Act's requirement that a sender include such an address in a commercial email and we applaud the Commission's well-reasoned proposal.

CAN-SPAM'S APPLICABILITY TO EMAIL MESSAGES SENT TO MEMBERS OF ONLINE GROUPS

We believe that there should be no distinction under CAN-SPAM between email messages sent to members of groups and email messages sent to recipients who are not members of groups. We do not see any persuasive argument for changing this analysis when the message is (1) sent by a group member, (2) sent by a source outside of the group, (3) first reviewed by a moderator or (4) related or unrelated to the subject of the group. We believe any distinction under CAN-SPAM the Commission might grant to email messages sent to members of online groups would give unfair advantage to the operators of such groups without any compelling justification to do so. Further, such a distinction would create an incentive for "group" status which would likely be exploited by aggressive advertisers and publishers.

CONSIDERATION FOR COMMERCIAL TRANSACTIONS

We believe that, regardless of whether the Commission determines that a "commercial transaction" under section 7702(17)(A)(i) can exist in the absence of an exchange of consideration, adequate consideration exists in the types of relationships discussed in the NPRM and that are typical within the industry.

The underlying question is whether agreeing to receive commercial email is sufficient consideration. It is well-established contract law doctrine that, to be legally sufficient, consideration for a promise must be either legally detrimental to the promisee or legally beneficial to the promisor. It is further established that a person can incur legal detriment in either of two ways: (1) by doing or promising to do something that he or she had no prior legal duty to do or (2) by refraining from or promising to refrain from doing something that he or she had no prior legal duty to refrain from doing. A key purpose of the CAN-SPAM Act is to allow individuals to decline to receive unwanted commercial email and it is incumbent upon each individual to decide which commercial emails shall be considered unwanted. Accordingly, in registering for a free internet service, the mere act of providing one's email address to the service operator and agreeing to receive commercial email is legally sufficient consideration to support an enforceable contract between the registrant and the operator as the registrant has no legal duty to do so.

Further, we believe it will be helpful for the Commission to note the three generally accepted advertising pricing models within the industry: (1) cost per thousand (CPM), whereby the publisher receives a set fee for each thousand advertising impressions delivered by the publisher; (2) cost per click (CPC), whereby the publisher receives a set fee for each individual delivered by the publisher that clicks a pre-determined hyperlink;

and (3) cost per action (CPA), whereby the publisher receives a set fee for each individual delivered by the publisher that performs a pre-determined action, such as registering for a website or purchasing a product or service.

Under each of the above models, the publisher derives a benefit from increased viewing of the advertising message being published. And it is typical within the industry for individuals to agree to receive and view advertising messages during the registration process for a website. Accordingly, the mere act of viewing an advertising message— the something an individual has no legal obligation to do— inherently transfers good and valuable consideration to the publisher.

Thus, we urge the Commission to recognize that adequate consideration to support a "commercial transaction" under section 7702(17)(A)(i) exists whenever an individual agrees to receive commercial email and/or view advertising messages.

DELIVERY OF NEWSLETTERS OR OTHER CONTENT AS TRANSACTIONAL OR RELATIONSHIP MESSAGES

We believe that when a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content any email messages the primary purpose of which is to deliver such newsletters or other electronically delivered content should be deemed transactional or relationship messages. We note that, given the definition of "transactional or relationship message" in the Act, to suggest otherwise is to suggest that newsletters and other electronically delivered content are not "goods or services," a position for which we find no support.

We believe that the labeling, opt-out mechanism and postal address requirements of the Act that would be applicable should the Commission deem that these messages are not "transactional or relationship messages" would significantly distract consumers away from the messages' actual content as well as impose unnecessary costs on the providers of such content.

"FORWARD-TO-A-FRIEND" EMAIL MESSAGES

As the internet matures, "forward-to-a-friend" messaging remains exemplary of the transformative effect of the global computer network. In recent years forward-to-friend programs have helped drive the growth of social and professional networking, online photo sharing, and assorted collaborative extensions to publishing and merchandising business models. As an electronic embodiment of word-of-mouth "buzz" marketing, forward-to-friend marketing programs can help make innovative and valuable services widely available. Implemented within a business process, forward-to-friend programs add value to both consumers and businesses. For example, when an individual sends a link to a product to a friend who may have interest in purchasing it, the recipient benefits from receiving information regarding a recommended product and the business benefits by reaching a new potential customer. The mutual benefits conferred on consumers and businesses through forward-to-friend programs are even more apparent in applications

such as social networking websites where promoting the product and using it are very much intertwined and the value of the application to the consumer increases as the consumer refers additional friends. In addressing the many instances of forward-to-friend programs we encourage the Commission to give first priority to protecting the freedom of consumers to communicate with one another and for business to continue to produce innovative peer-to-peer products and services. We believe that this objective can be accomplished without creating loopholes contrary to the purpose of the Act or otherwise undermining it.

Perhaps the most intuitive and clear way to protect private communication is to establish it as a separate class of email under the constructs of "primary purpose." Thus email sent between individuals who know one another should be exempt from classification as commercial messages for the purposes of the Act.

In the absence of such a classification, we believe that any guidance regarding forwarded email messages must take into consideration whether the primary purpose of an email message is the promotion of a product, service or website or whether such promotion is simply an incidental result of a different purpose. Many websites encourage users to forward email messages in order to join the users' social networks, view the users' online photo albums and a wide variety of other purposes. These messages should not be deemed "commercial" under the Act as the promotion of the website is secondary to such other purposes. Accordingly, in such instances, the website should not be deemed to be a sender of the forwarded message.

We are very troubled by the Commission's interpretation of the Act's definitions relating to forward-to-friend scenarios and fear that their implications make most such programs impossible. As a general matter, we believe that peer-to-peer messages were not considered thoroughly by Congress during its framing of the Act and that the diverse forms of such messages that exist today simply were not anticipated. Peer-to-peer messages were not intended to be governed by the Act. However, as the Commission's discussion regarding "Forward-To-A-Friend" messages in the NPRM indicates the Commission's intent to regulate such messages, we respectfully submit that such discussion does not provide sufficient guidance to the industry.

In the Commission's discussion of the definition of "procure" in the NPRM, the Commission states "… a person who intentionally pays, provides consideration to, or induces another to send on his or her behalf a commercial e-mail message that advertises or promotes his or her product may be considered to have 'procured' the origination of that message under the Act…" We believe the Commission should make clear through further discussion or rulemaking that, in order to fall under the definition of "procure," the payment, consideration or inducement from the sender or initiator must expressly be for or to the forwarding of the email message as opposed to other means of advertising or promotion. Many websites provide payment or consideration to or otherwise induce individuals to refer friends but do not provide specific incentives for referrals made via email messages as opposed to other means of communication. We believe that the payment, consideration or inducement must be specific to the forwarding of an email

message in order to fall under the definition of "procure." If the website has not provided payment or consideration or otherwise induced an individual to send each additional email message, the website has not "procured" the origination of that message.

We find clear support for the foregoing in both of the Commission's examples regarding inducement set forth in footnote 178 of the NPRM which expressly encourage the forwarding of the email message. We believe any interpretation of "procure" to include payment, consideration or inducement that is not specific to the forwarding of an email message would be impracticable as any statement— online or offline— encouraging or prompting the advertising or promotion of a product, service or website could be determined to have "procured" the sending of an email message. We do not believe this was Congress's intention.

Finally, we believe it is of critical importance to preserve an individual's freedom to choose his or her desired method of forwarding messages to friends. Otherwise, consumers will be unreasonably constrained to use inconvenient methods of doing so. Accordingly, as it is impossible for a website to ensure an individual does not forward an email to someone who has requested not to receive messages relating to that website, we strongly urge that the Commission's guidance regarding forwarded email messages also take into consideration the level of control the website has over complying with the requirements of CAN-SPAM and the actions it takes to encourage such compliance. If the headers of the original message were compliant under the CAN-SPAM Act and the original recipient modifies such headers when forwarding the message, the website should not be responsible if the modified headers fail to comply with CAN-SPAM. Similarly, if the original message contains an opt-out mechanism that complies with the CAN-SPAM Act and the original recipient removes or modifies such mechanism, the website should not be responsible if the modified message fails to comply with the opt-out requirements of CAN-SPAM. Lastly, as providing a mechanism whereby the original recipient can confirm whether his or her friends have opted-out from receiving messages from the website in the past would breach standard privacy policy obligations within the industry, the website should not be responsible if the original recipient forwards the message to an individual who has opted-out of receiving messages from the website in the past.

THREE BUSINESS DAYS TO HONOR OPT-OUT REQUESTS

We respectfully submit that the Commission's proposed shortening of the time period to honor opt-out requests is unwise.

Jumpstart's efforts to ensure that individuals who request not to receive email messages from Jumpstart do not receive email from Jumpstart are unparalleled within the industry. We have tasked an extraordinary team of engineers, customer service representatives, network operations workers and full-time compliance counsel for such purpose and process opt-out requests submitted via unsubscribe links, email, postal mail and telephone. It is a testament to the responsibility and diligence of such personnel that virtually all opt-out requests submitted to Jumpstart are processed within 24 hours.

Nevertheless, we feel there are compelling reasons for maintaining the current 10 business day time period.

First, each of the multiple opt-out mechanisms required under the Act require action by and coordination with third parties in order to ensure individuals' opt-out requests are honored. Advertisers must provide their suppression lists to advertising networks. Advertising networks must provide advertiser suppression lists to list owners. List owners must then process the suppression lists and "scrub" their lists to remove individuals who have opted-out. Each of these steps must occur before a new email marketing campaign is deployed. Further, lists often must be encrypted prior to being transferred to other parties in order to ensure the security of the consumer data contained therein, adding another layer of complexity. We believe that, in some circumstances, three days is an unreasonably short time period in which to undertake these tasks.

While there are products that exist that can effectuate opt-out requests almost immediately, we believe such products are incapable of handling the sophisticated processes required when working with multiple list providers, advertisers and affiliates. Indeed, we found it necessary to make a considerable investment of time and resources in order to develop and maintain our current opt-out processes.

Second, we believe a three-day opt-out time period will result in increased consumer confusion that will be detrimental to the industry. Many users choose to mail their opt-out requests to the postal address contained in the email messages pursuant to the Act. Often, such requests are not actually received by the sender for several days. Consumers who believe they will stop receiving mail three days after sending their requests will become frustrated when that is not always the case.

Third, we acknowledge the Commission's concerns regarding the possibility of unscrupulous marketers "bombarding" the email addresses of individuals who have submitted opt-out requests during the 10-day grace period allotted under the Act for processing such requests and we believe such concerns may be properly addressed through additional rulemaking which would prohibit such practices. A shorter time period will not prevent these marketers from engaging these practices, it will simply penalize reputable marketers who are trying to empower consumers.

Jumpstart appreciates the opportunity to comment on this matter.